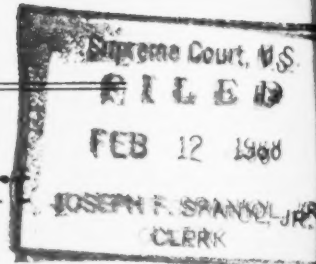


(2)  
No. 87-1196

In the Supreme Court  
OF THE  
United States



OCTOBER TERM 1987

ATLANTIC RICHFIELD COMPANY,  
*Petitioner,*

v.

JOHN V. NIELSEN,  
*Respondent.*

On Petition for Writ of Certiorari to the Court of  
Appeal of California, Fourth Appellate District

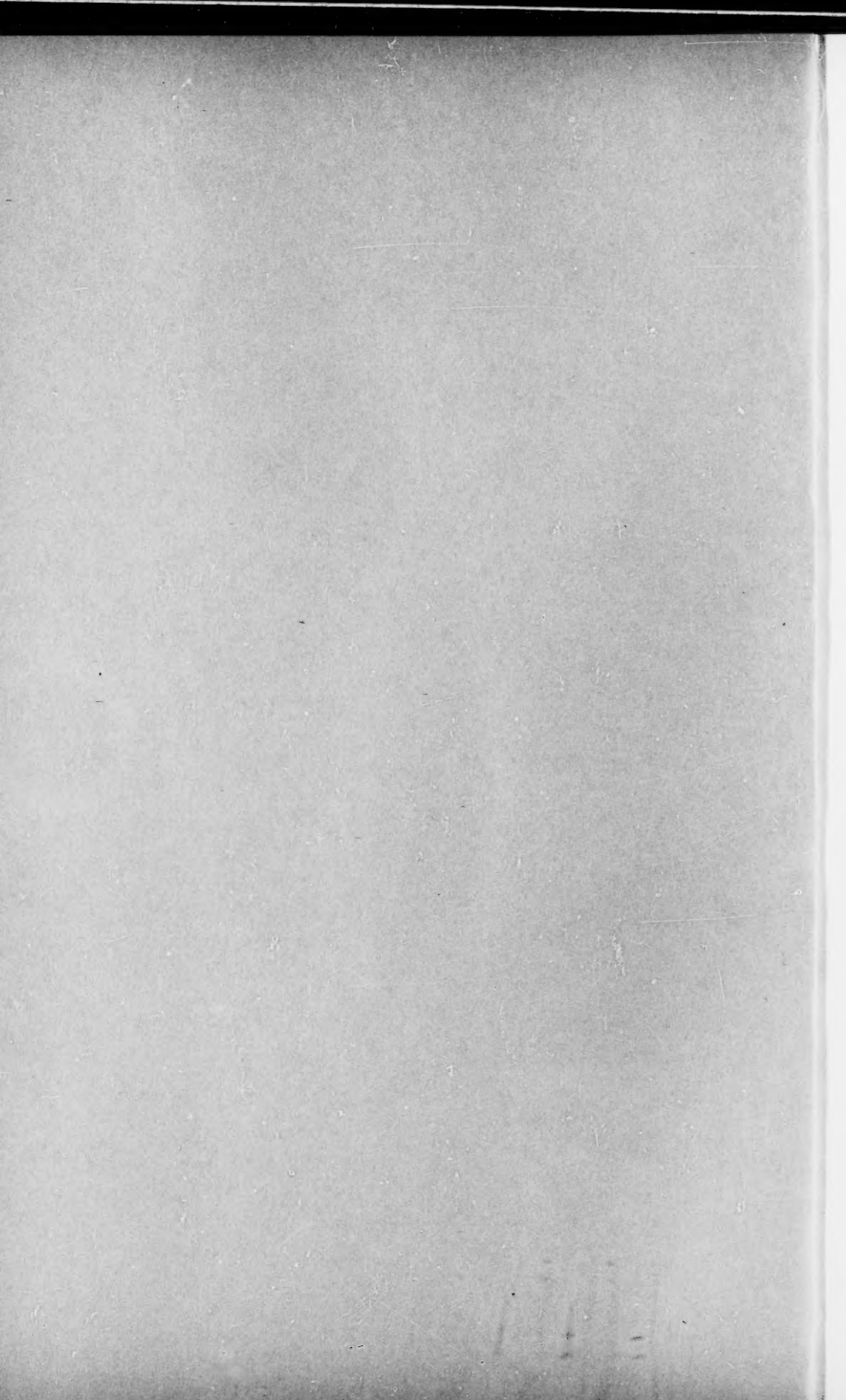
BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

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## STATEMENT OF THE CASE

This case arises out of petitioner Atlantic Richfield Company's ("ARCO") crash program to salvage its retail gasoline division by converting retail stations into new units combining self-service, low-priced gasoline with high-priced convenience grocery stores. This program involved a dealer rent and gasoline sales structure that guaranteed ARCO's profits even though many independent dealers could not and did not survive under the new program. Acquiescence of independent dealers in the new program was crucial to ARCO. Therefore, to induce its independent dealers to abandon profitable going concerns and invest in the new program, ARCO withheld data it developed in-house regarding both actual and projected dealer profits, but supplied station operators with false

profit data and misleading descriptions of its analyses and expertise.

Respondent John V. Nielsen, a successful independent ARCO dealer, was fraudulently misled and pressured into participating in the new program. In 1981, Nielsen sued ARCO in the California courts. Trial commenced on August 7, 1985 (RT 4).<sup>1</sup> On September 24, 1985, the jury found ARCO engaged in fraud and deceit and rendered a verdict in favor of Nielsen in an amount of \$525,788 for compensatory damages and \$3,500,000 for punitive damages. ARCO unsuccessfully challenged the verdict in motions for a new trial and for judgment notwithstanding the verdict. In an unpublished opinion ("Op."), the California Court of Appeal unanimously affirmed the verdict, except for striking \$50,000 awarded for emotional distress. ARCO petitioned the Court of Appeal for rehearing. This petition was denied in an order modifying the opinion ("M. Op."). ARCO then petitioned the California Supreme Court for review, which was denied on October 14, 1987.

In a petition for certiorari to this Court, ARCO challenges the punitive damages award on the grounds that the size of the award violates the Excessive Fines Clause of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. Neither these nor any other federal constitutional challenges to the punitive damages award were raised in or decided by the California courts. Petitioner *never* mentioned the Due Process Clause of the Fourteenth Amendment in any pleading or argument to the California courts. Nor did petitioner ever argue to any California court that the punitive damages award should

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<sup>1</sup>"RT" or page and line references such as "111:00" refer to the reporter's transcript. "CT" refers to the clerk's transcript.

be overturned as inconsistent with the Excessive Fines Clause. Petitioner is thus precluded from raising these federal questions for the first time in this Court.

### A. Substantive Facts

Petitioner ARCO has misrepresented or omitted many material facts in its statement of the case. Accordingly, a concise counterstatement is necessary to make clear that there is ample evidence in the record to support the verdict as well as the successive post-trial decisions by the California courts.

ARCO's vice president of retail marketing testified that in 1974 its retail gasoline operation lost \$45,000,000 "and there was a real serious question" whether ARCO would "stay in the retail service station business." 1764:25-1765:2. He explained the mini-market program "was the first major project" for ARCO to get back on track and "make a lot of money for the company." Had the program failed, it "almost was tantamount to the failure of the marketing department, the retail marketing department." 1765:6-17.

Under the mini-market program, ARCO's profit increased spectacularly and was virtually risk-free because: (1) ARCO gasoline sales increased as much as 300% due to low dealer profit margins coupled with self-serve equipment (759:16-20);<sup>2</sup> (2) ARCO charged dealers a high

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<sup>2</sup>Every gallon sold is ARCO gas. Thus, high volume gasoline sales benefit ARCO regardless of whether the operator survives. In the words of ARCO's first San Diego mini-market dealer representative, "[O]ur primary function was to have throughput . . ." 254:11-12. ARCO's former national mini-market ("AM/PM") franchise manager testified "the primary responsibility" of an ARCO dealer representative was "to make sure . . . we are trying to sell all the gasoline that is available." 1641:9-13; 1642:12-17.

minimum rent on the grocery store plus a percentage of all grocery sales above the minimum (254:18-24; Ex. 1049), plus "rent" for ARCO's gas the dealer sold (765:20-22); (3) ARCO was the only major company offering gas and convenience food at all conversions (1762:26-1763:2); (4) ARCO had virtually no risk of operating the unit, passing all risks to the independent dealer/operator, and if a dealer could not survive ARCO's wholly-owned subsidiary was designed to take over.

Thus, in 1977, ARCO decided to convert 500 units in three years. 1756:2-24; 1775:4-8. Its \$5.5 million conversion budget for 1978 increased to \$8.8 million for 1979 (568:5-16). In February 1978, ARCO's top management admonished that units were not being converted quickly enough, particularly in the West. Ex. 133. A year and a half later, months after serious questions had been repeatedly voiced within ARCO about the soundness of the program and the dealers' ability to survive (Exs. 149, 182, 308), ARCO had weekly checks to assure the budgeted dollars were still being spent and targeted conversions completed. Ex. 177. Promotions of ARCO people depended on success in convincing dealers to convert. 255:4-21.

A major impediment to ARCO's conversion schedule was that most, if not all, of its independent dealers were on leases that had to be regularly renewed under applicable law, barring exceptional circumstances. RT 263:1-264:4. Therefore, ARCO could not simply terminate dealers not willing to convert. Also, the entire ARCO organization recognized independent dealers were more motivated, harder working and more committed than company employees. 262:20-28; 263:1-264:4, 786:27-787:4. ARCO's analysts established minimum sales volume projections ("VP's") and other information to assure ARCO

recovered its investments with an acceptable profit margin, but the independent dealers were not given the survey information which ARCO developed for itself (425:1-7). Instead, ARCO's disclosure policy to dealers was to always give a "positive answer," and to present positive data in order to win the dealer over (247:17-21; 254:28-255:10).

To prevent having to close and sell units after a dealer was exhausted and broke, ARCO moved in its wholly-owned subsidiary, Prestige Stations, Inc. ("PSI"). One of PSI's principal functions was to quickly take over any unit given up by an independent dealer. 1396:20-1397:1. Even though ARCO strongly preferred independent operators, by December of 1982, PSI had to operate over half (15 of 29) of ARCO's mini-markets in San Diego County; coincidentally, Nielsen's unit was the first (1396:7-19; 2158:24-27).

Nielsen had become a Richfield dealer in 1967. In the next eleven years, he had a profitable business and an outstanding reputation, receiving uniformly good to outstanding reports from ARCO supervisors. Exs. 105, 86, 95; RT 1698:7-15; 1732:5-19; 267:3-6. He had the same mechanic for eleven years, a loyal crew of attendants and 470 steady customers. 828:26-27; 830:19-25. He had ample free time and opportunities to travel. 624:19-26; 829:13-21; 830:26-832:2. "He was a very successful, very healthy man." 978:8.

He had no desire to give up his business and life-style until numerous ARCO meetings, presentations, entreaties, a slick brochure and ostensibly hard data won him over. In this process, and consistent with its larger scheme, ARCO:

1. Failed to disclose either its first or second analysis both of which showed conversion of Nielsen's unit would be a disaster for him;

2. Fabricated a third analysis to justify conversion, the results of which it *did* give Nielsen;

3. Decided before conversion that it would increase Nielsen's minimum rent after conversion, and that it would delete essential pumping capacity, but did not inform him until Nielsen had agreed to convert, his original station had been torn up, and it was economically impossible for him to turn back;

4. Failed to disclose that ARCO regarded the conversion program as experimental, particularly for Nielsen's station; and

5. Failed to disclose existing mini-market conversions were actually doing far worse than indicated by the profit figures ARCO gave Nielsen.

At about the time of ARCO's second analysis, Nielsen had several meetings with ARCO representative, Mr. Abbott, and was "encouraged" by "the company" to think about converting. Even though Abbott had the discouraging results of ARCO's second analysis, Abbott told Nielsen ARCO had performed surveys on his site and thought it would be a very successful unit. 834:23-836:6. Nielsen repeatedly asked for the specifics contained in the surveys, but Abbott never gave any answers. 836:7-21. Nielsen was asked to come to a restaurant meeting where at least five and possibly six ARCO representatives "explained" the program to him alone. 1725:3-18; 1733:5-10. Still, he was undecided ("borderline"). 837:25-27.

ARCO's principal factual contention at trial and on appeal was that it used accurate demographic information in its third analysis, the results of which were given to

Nielsen at yet another meeting, in September 1978 (Ex. 300). In fact, ARCO's manager of the Anaheim Region and the manager responsible for deciding which units to convert (C.T. Fulkerson) instructed the sales forecaster (W. Ottman) to revise his earlier calculations using incorrect and unsupportable demographic data. Fulkerson instructed Ottman to assume a 200% population increase from the earlier calculation (Ex. 1087K) even though the actual population increase was 18-26% (1053:3-1054:13; 462:2-21; Ex. 15). Fulkerson told Ottman to assume a housing density increase of some 600% (Ex. 1087K), even though the actual housing density increase was 50% (1054:14-27). As the Court of Appeal Opinion noted, ARCO's appellate counsel was forced to concede there was an exhibit showing the "housing unit density factor was not accurate and Ottman ignored the data in his own files on the direction of Fulkerson." Op., App. 17a:5-9.

After the September 1978 meeting, ARCO reassessed its own profitability and expenditures in light of federal gas allocation restrictions. First, it deleted a \$20,000 projected expenditure for lengthened pump islands and new pumps at Nielsen's unit. Nielsen was not told about this until the end of May 1979, when his unit was already torn up and his old business abandoned. 858:22-859:27.

To further protect its own profits, ARCO raised Nielsen's minimum store rent from \$2,000 (Ex. 300) to \$3,000/month, and also charged rent for self-serve equipment. On May 8, 1979, after Nielsen had signed all the new agreements but before ARCO started construction, Fulkerson signed off on ARCO's fourth analysis incorporating — in-house — these rent increases. Ex. 9B. Nielsen did not know about the amount of the rent increase

until December 1979, five months after he opened the converted station (870:12-28).

Despite ARCO's professed experience and competence (Ex. 301) asserted to Nielsen and other dealers, ARCO was, in mid-1978 to 1979, still very much in an experimental mode. 2140:27-2141:10. On May 2, 1979, an ARCO internal memo said of units (like Nielsen's) whose projected food sales were less than \$250,000, they "will be considered experimental." Ex. 2024 at 3. No one ever hinted to Nielsen his conversion was actually "considered experimental" by the company.

During the time Nielsen's unit was being converted, ARCO's own top management acknowledged in writing that ARCO lacked sophisticated knowledge, that the program was still early and that its volume projections were faulty. J.J. Conway (Manager of Sales and Sales Development) wrote top management that units should be converted "back" if the dealer could not survive. But ARCO vetoed the idea. Ex. 149.

Nor did ARCO disclose to "prospects" like Nielsen, the *actual* profitability of units that had already been converted. Under an ARCO internal memo (written months before Nielsen was convinced to convert), the dealer profitability of all 89 existing mini-markets was summarized. Ex. 305. Only seven of the 89 units averaged a dealer profit of \$3,600/month or more, the figure ARCO gave Nielsen. Thirty-six were averaging less than \$500 per month operator profit; many were losing money for the dealer. Because Nielsen's unit was small, had "minimal" foot traffic (Ex. 16), was in an "upper middle income" area (Ex. 15), had many elderly surrounding it, was not near a freeway off-ramp (*see* 1702:24-28) or industrial area (*see* 1702:11-17), it was ludicrous to project that it would on average out-perform all but seven of the 89

existing units.<sup>3</sup> But no data such as Exhibit 305 were ever disclosed to Nielsen.

Except for sales of gasoline, Nielsen closed his conventional unit in May 1979, and reopened as a mini-market August 4, 1979.

During the twenty months he operated the mini-market, grocery sales never approached the levels ARCO had given him. Meanwhile, the rent charged by ARCO mounted steadily until it became intolerable. By August 1980, less than a year after opening, the total rents charged by ARCO for the store, gas, self-service equipment, etc., were over \$4,000/month, or over \$2,000 more per month than ARCO had told Nielsen would be charged for much higher sales. *See* Exs. 1005, 2044A.

After all his funds were gone, Nielsen asked ARCO for advice. ARCO advised selling out and a prospective purchaser made an offer (RT 892-895), but ARCO decided the buyer was unqualified. Nielsen was at the end of his tether and turned the keys over to ARCO's subsidiary PSI, on April 1, 1981.<sup>4</sup>

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<sup>3</sup>ARCO knew these factors are critically important to the success or failure of a mini-market. ARCO had comprehensively studied and reported these factors in-house, but never explained them to dealers. *See, e.g.,* Ex. 302.

<sup>4</sup>ARCO asserts that in the view of the trial court, the verdict "could have gone the other way." Pet. 8:8-9. ARCO has left out the trial court's other remarks: "Your verdict, in my opinion, is entirely consistent with the evidence you heard . . . I see nothing inconsistent with the evidence you heard in this case, in this courtroom." RT 2531:18-22.

At the hearing on ARCO's post-trial motions, the trial court said, "[T]he case was fairly and accurately tried, and the damages found by the jury were well within the range of evidence and range of reasonableness, . . . I think the jury could have arrived reasonably at

## B. The Procedural Facts

At no time in the six years of proceedings before the California courts did petitioner raise a federal constitutional challenge to the claim or award of punitive damages. Before trial, ARCO raised ten separate affirmative defenses, but made no mention of a federal constitutional defense to punitive damages (CT 259-261). ARCO filed seven briefs respecting various *in limine* matters at trial (CT 426-465), none of which mentioned constitutional objections to punitive damages. ARCO challenged the compensatory damages jury instructions on a number of grounds (RT 2397), but made no constitutional objection to the standard "BAJI" California punitive damages instructions (RT 2394). Nor did ARCO raise constitutional issues in post-trial motions.

On November 3, 1986, ARCO filed its opening brief to the California Court of Appeal. Neither this brief nor ARCO's reply brief (filed on March 2, 1987) mentioned any possible constitutional restrictions on the punitive damages award. In April 1987, prior to oral argument, both ARCO and Nielsen wrote letter briefs to the Court of Appeal regarding the then recent *Downey* decision of the California Court of Appeal.<sup>5</sup> This case held that neither the Excessive Fines Clause of the Eighth Amendment nor the Due Process Clause's criminal safeguards are applicable in civil suits for punitive damages. 189 Cal.App.3d at 1100-01. Despite explicit discussion of those constitutional issues in *Downey*, ARCO continued to refrain from raising any such issue in the present case. In fact, ARCO

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a larger number [for punitive damages] than they did." RT Post Trial Hearing 22:6-28.

<sup>5</sup>*Downey Sav. & Loan Ass'n. v. Ohio Casualty Ins. Co.*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (1987), no. 87-159 on Petition to this Court.

argued that the *Downey* analysis of punitive damages supported its position for reversal. ARCO Letter Brief, April 13, 1987. And in neither oral argument before the Court of Appeal nor on petition for rehearing to that court did ARCO raise any constitutional challenges to the punitive damages award.

On August 17, 1987, ARCO filed a petition for review in the California Supreme Court. Review by that court is discretionary. ARCO's petition ("Cal. Pet.") argued at length against the punitive damages award, but the argument was carefully and deliberately limited to an adoption of California's traditional three factors that "'afford guidance' for the review of punitive damages: (1) the reprehensibility of the . . . conduct; (2) the actual injury suffered; and (3) the wealth of the defendant." Cal. Pet. 12:14-17 (citation omitted). ARCO did not challenge the constitutionality of this analysis; it endorsed the analysis and argued that the lower courts had misapplied traditional California law.

In a footnote to the petition to the California Supreme Court in the midst of its argument relying on current California law, ARCO made one oblique reference to the Excessive Fines Clause of the Eighth Amendment.<sup>6</sup> But this footnote *did not* urge reversal of the punitive damages award on Eighth Amendment grounds. This footnote

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<sup>6</sup>ARCO's footnote mention of the constitutional issue came immediately after the following words:

[A]ll three of the factors are "grounded in the purpose and function of punitive damages" and therefore should be considered. 21 Cal.3d at 928.

Consideration of these factors is necessary to ensure that the punitive damage award is not excessive.

Cal. Pet. 13:5-10.

merely suggested that if the United States Supreme Court should establish Eighth Amendment limits on punitive damages in the pending case of *Bankers Life and Casualty Co. v. Crenshaw*, No. 85-1765, then ARCO "would also argue to" the California Supreme Court that the award violated the Excessive Fines Clause. The Due Process Clause was never mentioned.

Throughout this litigation, ARCO had ample opportunity to raise federal constitutional challenges to the punitive damages award and was on notice of the existence of the claims it now seeks to assert for the first time. Probably the leading modern California case involving constitutional challenges to California's punitive damages law, *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 716-17, 719, 60 Cal. Rptr. 398, 417-18 (1967), rejected the application of criminal procedures and quantitative standards to civil punitive damage determinations. The last California challenge to punitive damages on constitutional grounds decided during the pendency of this case is *Downey*. Between *Toole* and *Downey*, numerous other litigants challenged the constitutionality of California's punitive damages law.<sup>7</sup>

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<sup>7</sup>See, e.g., *Fletcher v. W. Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 404-05, 89 Cal. Rptr. 78 (1970) (challenge on vagueness of punitive damages being allowed for "oppression, fraud, or malice"); *Wetherbee v. United Ins. Co. of Am.*, 18 Cal. App. 3d 266, 272, 95 Cal. Rptr. 678 (1971) (punitive damages challenged as imposition of a fine without benefit of constitutional rights afforded criminals); *Gibson v. Gibson*, 15 Cal. App. 3d 943, 949, 93 Cal. Rptr. 617 (1971) (same as to right to competent counsel); *Bertero v. Nat'l Gen. Corp.*, 13 Cal. 3d 43, 66 n. 13, 118 Cal. Rptr. 184 (1974) (challenge on lack of standards); *People v. Superior Court*, 12 Cal. 3d 421, 432-33, 115 Cal. Rptr. 812 (1974) (challenge that punitive damages case must allow invocation of privilege against self-incrimination); *Zhadan v. Downtown L.A. Motors*, 66 Cal. App. 3d 481, 501-02, 136 Cal. Rptr. 132 (1976)

Similarly, California federal cases have spotlighted the constitutional questions. *In re Related Asbestos Cases*, 543 F.Supp. 1152, 1157 (N.D. Cal. 1982) (court rejected various constitutional challenges at the pre-trial stage as "inappropriate . . . at the present time . . .").

Finally, this Court on April 22, 1986, squarely invited resolution of constitutional limits on punitive damages stating, "These arguments raise important issues which, in an appropriate setting, must be resolved; . . ." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, —, 89 L. Ed. 2d 823, 837 (1986). This Court's decision in *Lavoie* was rendered several months *before* ARCO filed its opening brief to the Court of Appeal. Despite this widespread judicial discussion of the constitutionality of punitive damages — and ARCO's awareness of the discussion — ARCO never saw fit to raise the constitutional issues in the California courts.

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(challenge for lack of standards as to amount of punitive damages and that punitive damages were "cruel and/or unusual" punishment). *Egan v. Mut. of Omaha Ins. Co.*, 24 Cal. 3d 809, 819-20, 157 Cal. Rptr. 482 (1979) (challenge to Cal. Civ. Code § 3294 as unconstitutional). *Hannon Eng'g, Inc. v. Reim*, 126 Cal. App. 3d 415, 430-31, 179 Cal. Rptr. 78 (1981) (challenge to lack of standards for punitive damages). *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 811, 174 Cal. Rptr. 348 (1981) (challenge to punitive damages on ex post facto, double jeopardy and "fair warning" grounds). *Hasson v. Ford Motor Co.*, 32 Cal. 3d 388, 402 n. 2, 185 Cal. Rptr. 654 (1982) (challenge to punitive damages statute as unconstitutional on "a number of theories"). *Peterson v. Superior Court*, 31 Cal. 3d 147, 160-61, 181 Cal. Rptr. 784 (1982) (challenging punitive damages on due process and ex post facto grounds).

## ARGUMENT

### I

#### BECAUSE ARCO DID NOT PROPERLY RAISE ANY FEDERAL QUESTION IN THE STATE COURTS, ITS PETITION MUST BE DENIED

It is essential to the jurisdiction of this Court that a substantial federal question was properly raised in state court proceedings. Rule 21.1h requires the petition to "specify the stage in the proceedings, both in the . . . first instance and in the appellate court, at which the federal questions . . . were raised; . . ." ARCO did not raise or even mention its due process challenge at any stage. It has belatedly and conditionally mentioned the Excessive Fines Clause of the Eighth Amendment, but it never asked the California courts to rule that the punitive damages award violated the Eighth Amendment. Hence, this Court lacks jurisdiction. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 182-83 n. 3 (1983) and cases cited therein.<sup>8</sup>

Indeed, ARCO concedes it did not "assert an Eighth Amendment (or Due Process) right to be free of excessive civil punitive damages, . . ." in the California courts. Pet. 10:4-6. This concession alone requires ARCO's petition be denied. ARCO nonetheless, appears to assert two justifications for failing to raise these issues. Its primary justification is that "then-existing law did not recognize any such right" and hence it could not have waived the right to raise the point. Pet. 10:5-7; 10:28-11:3.

If ARCO's argument were to be followed, the rule requiring federal issues first be properly raised in the state courts would be meaningless in every case unless

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<sup>8</sup>See Stern, Gressman & Shapiro, *Supreme Court Practice*, 144 (6th ed. 1986).

and until some court had squarely held the specific federal right in question to exist or some statute had so decreed. If accepted, ARCO's argument would eliminate, for most cases, the deeply rooted and sensible rule that state courts must be given a meaningful opportunity to deal with federal challenges to their law as applied to a particular case before this Court may be asked to review that case. Hence, it is not surprising that ARCO does not cite, and we have not found, any decision which holds that, as a predicate to review by this Court, the federal issue need be raised in the state courts only when the federal right has been previously established.

On the contrary, this Court has recently held in a closely analogous context the perceived novelty or futility of a claim does not excuse the failure to raise it, particularly where other counsel have raised it and the issue has, as with the issues here, been fermenting in California and other courts for years. Where "various forms of the [constitutional] claim . . . had been percolating in the lower courts for years . . . it is simply not open to argue that the legal basis of the claim . . . was unavailable . . ." *Smith v. Murray*, 477 U.S. —, 91 L. Ed. 2d 434, 446 (1986).

If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts . . . because he thinks they will be unsympathetic . . .

...

Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labelling alleged unawareness of the

objection as cause for a procedural default. [fn. omitted]

*Engle v. Isaac*, 456 U.S. 107, 130-134 (1982).

ARCO cites only one totally inapposite case in support of its non-waiver argument. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). *Butts* did not deal with the long-standing jurisdictional requirement that substantial federal questions must be properly raised in the state court as a predicate to jurisdiction in this Court. Rather, *Butts* started in the United States District Court for the Northern District of Georgia. The plurality quote cited by ARCO dealt with whether it was reasonable for the publishing company to not raise an affirmative defense at the pretrial stage in anticipation of developing but unsettled federal law. *Butts* had nothing to do with the jurisdictional requirement, or the policies of comity and federalism that are central to this Court's review of state court cases.

A second justification asserted by ARCO for not raising constitutional issues is that the California courts should have anticipated and used constitutional factors "nonetheless." ARCO's precise statement is:

While framed under state law, petitioner's arguments nonetheless should have caused the courts to examine some or all of the factors that this Court will likely hold are relevant to the inquiry under either the Eighth Amendment or the Due Process Clause,  
....

Pet. 9:17-23.

ARCO is at once arguing out of both sides of its mouth. First, it asserts it could not have known of its potential constitutional protections, but then says the California courts should have used "some or all of the factors" that

are "relevant" to the constitutional "inquiry." This admission totally destroys ARCO's non-waiver argument. If the courts should have *sua sponte* "examined" the factors "relevant" to the constitutional "inquiry" without the issue ever being raised, ARCO cannot credibly claim it is excused from raising and arguing the issues in the first place.

Recognizing that it had not raised any constitutional issue either in the trial court or in the Court of Appeal, ARCO asserts it nevertheless "called the California courts' [*sic* court's] attention to the Constitutional issue when it appeared that this Court could announce a new right." Pet. 11:18-20. This statement is incorrect. As noted, this Court invited scrutiny of constitutional issues in *Lavoie* (April 1986), and numerous recent published California cases had previously framed the issues.<sup>9</sup>

If ARCO and its counsel<sup>10</sup> genuinely intended to properly apprise the California courts of the constitutional issues, they would have squarely challenged (instead of adopting) traditional California punitive damages law. Furthermore, ARCO should have first presented to the California courts the request it now seeks from this Court, namely the request that the Court of Appeal hold its decision pending this Court's decision in *Bankers Life*. ARCO did none of this. Under these circumstances, ARCO has waived not only the right to assert the consti-

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<sup>9</sup>In its opening paragraph under "REASONS FOR GRANTING THE WRIT," ARCO asserts the Eighth Amendment and Due Process Clause issues "are substantial and recurring." Pet. 13:14-15. There is no doubt they are recurring; that is the very reason ARCO should have properly raised them in the state courts if it intended to assert them now.

<sup>10</sup>ARCO had seven counsel on its appellate briefs to the California courts, from three firms and in-house.

tutional issues but also has waived the right to request an order that the Court of Appeal vacate and reconsider its decision pending the decision in *Bankers Life*. ARCO's decision to wait until now to assert constitutional issues may result "from . . . ignorance," a tactical decision or a deliberate choice, "to withhold a claim in order to 'sand-bag' . . . ." *Engle v. Isaac*, 456 U.S. 107, 129 n. 34 (1982). In any event, ARCO should not be relieved from the consequences of its actions.<sup>11</sup>

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<sup>11</sup>ARCO cites *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154 (1945), in support of its claim that this Court should vacate the Court of Appeal decision in this case until after *Bankers Life* is decided. *Duel*, however, provides no support for the action petitioner urges. To the contrary, *Duel* held that "since the [state] Supreme Court did not pass on the [federal] question, *we may not do so*." 324 U.S. at 160 (emphasis added). The language petitioner quotes in support of its suggested disposition is plain dictum. In any event, even petitioner's quotation from *Duel* fails to support petitioner for two reasons.

First, in every case cited in the relevant portion of *Duel*, this Court had already properly exercised jurisdiction to hear other federal questions in the case, and the question was whether the Court should go on to resolve the issues properly before it or to defer resolution. In these cases, a supervening change in the law since the time of the judgment under review would have obviated the need for the Court to reach the federal questions properly before it. Thus, in order to avoid unnecessary adjudication of federal questions, in each of these cases this Court vacated the opinion below and remanded the case for reconsideration in light of the supervening law. No such rationale supports petitioner in the present case.

Second, *Duel's* dictum suggested no more than that a remand *might* be appropriate "in the interests of justice," if a party had been genuinely surprised by unforeseen "new questions" in the law which had just "emerged." 324 U.S. at 161. As we have demonstrated, ARCO can claim no such surprise in the present case because the "questions" ARCO now seeks to raise have been the subject of extensive discussion in the opinions of this Court and others for

Any suggestion that footnote 6 in ARCO's petition to the California Supreme Court adequately raised the Eighth Amendment issue is squarely disposed of by this Court's recent decision in *Bd. of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. —, 95 L. Ed. 2d 474, 487 n. 9 (1987). There appellants had asserted in their brief to the California Court of Appeal that California's Unruh Act might be unconstitutionally vague. But there, as here, the assertion occurred "in the course of an argument that the Unruh Act should be applied only to [certain organizations]." *Id.* This Court held, "This casual reference to a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim subject to our appellate jurisdiction . . . ." *Id.* Similarly, ARCO's casual reference to the Excessive Fines Clause "in the midst of an unrelated argument" *in favor* of applying California's traditional punitive damages analysis is insufficient.<sup>12</sup>

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years. ARCO had ample opportunity — and sufficient information — to raise these issues in the California courts.

<sup>12</sup>In any event, the California Supreme Court's failure to pass on the federal questions forecloses any further review. When "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969). See also *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n. 3 (1983); *Fuller v. Oregon*, 417 U.S. 40, 50 n. 11 (1974). ARCO does not dispute that under applicable California procedural requirements, "[a] claimed violation of a constitutional right must be raised in the trial court to preserve the issue for appeal." Pet. 12:8-10. *Selleck v. Globe Int'l, Inc.*, 166 Cal. App. 3d 1123, 1133 n. 5, 212 Cal. Rptr. 838 (1985). Thus, ARCO's failure to present the constitutional questions in conformance with state procedure is an adequate and independent ground barring review in this Court. *Michigan v. Tyler*, 436 U.S. 499, 512 n. 7 (1978) and cases cited therein.

At bottom, ARCO seeks to coattail on any potentially favorable ruling in *Bankers Life* and *Downey*, but to do so without having complied with the jurisdictional predicate that has been met in *Bankers Life* (in this Court on direct appeal), and in *Downey* (constitutional issues squarely raised in, decided and discussed by one California Court of Appeal).<sup>13</sup> Denial of ARCO's petition would be consistent with this Court's denial of the similar petition in *Judy's Foods, Inc. v. A&B Food Services Corp.*, No. 86-515, *cert. denied* (1986) (constitutionality of punitive damages not raised until after oral argument on appeal to United States Court of Appeals for the Sixth Circuit), and more recently of *Allstate Ins. Co. v. Hawkins*, 733 P.2d 1073 (Ariz. 1987), No. 87-40.

In *Hawkins*, the Arizona Supreme Court ruled that constitutional issues, respecting a \$3.5 million punitive damage award, raised and argued in a supplemental brief to the Arizona Supreme Court after oral argument there came too late. This case would be procedurally analogous to *Hawkins* if ARCO had briefed the constitutional issues

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<sup>13</sup>*Downey's* holding is no justification for ARCO's failure to raise the constitutional issues to the Court of Appeal in this case. There are six districts of the California Court of Appeal; they are divided into separate divisions for a total of 18 divisions in the state. *Downey* was decided by the First District, this case by the Fourth District. It is not uncommon for different districts to reach opposite conclusions on important, current issues, and decisions of one district are not binding on another. *People v. Stamper*, 195 Cal. App. 3d 1608, 1613, 241 Cal. Rptr. 449 (1987).

Moreover, this Court recognizes that "a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid." *Engle v. Isaac*, 456 U.S. 107, 130 (1982).

to the Court of Appeal<sup>14</sup> after argument by supplemental brief or on its petition for rehearing. But ARCO waited even longer to mention the Excessive Fines Clause and never raised that issue. Therefore, it is precluded from raising that issue now even more than petitioner in *Hawkins*, where at least the Arizona Supreme Court was squarely presented the issues and given an opportunity to decide.

## II

### **EVEN IF ARCO HAD PROPERLY RAISED CONSTITUTIONAL CLAIMS BELOW, IT WOULD BE INAPPROPRIATE TO GRANT CERTIORARI**

#### **A. Even In This Court, ARCO Appears To Adopt Current California Law But Complains It Was Not Followed**

ARCO commences its substantive argument with the assertion that “‘*carte blanche* [is] currently given to, and regularly exercised by juries’” to determine punitive damages and that the “root cause” of the growth in these awards is “abdication by appellate courts of their obligation to reduce excessive punitive damage awards.” Pet. 13:25-14:4. Recent published decisions in California show that juries do not have *carte blanche* and California appellate courts have not abdicated anything.<sup>15</sup>

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<sup>14</sup>The California Court of Appeal was the only appellate court reviewing this case as a matter of right. Review by the California Supreme Court is discretionary.

<sup>15</sup>*Ramona Manor Convalescent Hos. v. Care Enter.*, 177 Cal. App. 3d 1120, 225 Cal. Rptr. 120 (1986) (Court of Appeal remanded \$2.5 million punitive damage award); *Wayte v. Rollins Int'l, Inc.*, 169 Cal. App. 3d 1, 215 Cal. Rptr. 59 (1985) (affirmed trial court's reduction to \$200,000 of one \$950,000 punitive damages award, and reduction of

Next, says ARCO, the Court of Appeal relied "exclusively on ARCO's wealth" in reviewing the case and thereby failed "to consider the other controlling factors" under well-settled California law. Pet. 14. This is incorrect. The Court of Appeal expressly noted the factors which "provide guidance in determining whether the purpose and function of punitive damages is served in any particular case." M. Op., App. 44a. These, wrote the Court of Appeal, are, "Wealth of the wrongdoer . . . degree of reprehensibility of . . . the act, . . ." and "the reasonable proportion of punitives to the actual harm suffered." Op., App. 41a; M. Op., App. 44a. It concluded, "[U]nder *any traditional formula* the amount awarded is reasonable." Op., App. 41a (emphasis added).

Later, ARCO argues that under a variety of published California decisions, the arithmetic ratios in this case show the award "certainly is excessive when compared to other such awards in California." Pet. 18:4-19:24. This is incorrect. This case was neither a trend-setter, nor

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two other awards to \$50,000 from \$200,000); *Jahn v. Brickey*, 168 Cal. App. 3d 399, 214 Cal. Rptr. 119 (1985) (affirmed trial court's reduction of \$250,000 to \$100,000 in punitive damages); *Sprague v. Equifax, Inc.*, 166 Cal. App. 3d 1012, 213 Cal. Rptr. 69 (1985) (affirmed trial court's reduction of \$5 million punitive damage award to \$1 million); *Goshgarian v. George*, 161 Cal. App. 3d 1214, 208 Cal. Rptr. 321 (1984) (Court of Appeal reduced \$15,000 punitive damages award to \$7,500); *Burnett v. Nat'l Enquirer, Inc.*, 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983) (trial court reduced \$1.3 million award to \$750,000; Court of Appeal reduced it further to \$150,000); *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (trial court reduced \$125 million jury award to \$3.5 million); *Alhino v. Starr*, 112 Cal. App. 3d 158, 169 Cal. Rptr. 136 (1980) (Court of Appeal remanded \$150,000 punitive damage award); *Rosener v. Sears, Roebuck & Co.*, 110 Cal. App. 3d 740, 168 Cal. Rptr. 237 (1980) (\$10 million punitive damage award reduced to \$2.5 million by Court of Appeal).

unique, nor out-of-line under state law. In arithmetic terms, the punitive damage award is a smaller proportion of ARCO's net worth (\$6.7 billion) or annual net income (\$986 million) than several published California decisions decided before trial.<sup>16</sup> The punitive/compensatory damage award ratio (\$3.5 million/\$475,000<sup>17</sup> or about 7.37/1) is also well within recognized limits in California. *See generally Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 155 Cal. App. 3d 381, 202 Cal. Rptr. 204 (1984); *Moore v. Am. United Life Ins. Co.*, 150 Cal. App. 3d 610, 197 Cal. Rptr. 878 (1984) (ratio is 83:1).<sup>18</sup>

Even if ARCO's points that juries have *carte blanche*, that appellate courts have abdicated, and that the Court of Appeal did not apply settled California law or reasonable arithmetic ratios were all true, this Court has no

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<sup>16</sup>*Betts v. Allstate Ins. Co.*, 154 Cal. App. 3d 688, 711, 201 Cal. Rptr. 528 (1984) (\$3 million punitive damages represented "less than one-half week's earnings of Allstate." One-half week's earnings of ARCO would be over \$9 million). *Moore v. Am. United Life Ins. Co.*, 150 Cal. App. 3d 610, 197 Cal. Rptr. 878 (1984) (\$2.5 million punitive damages represented 3.2% of defendant's net worth and 6.6% of its annual income. In contrast, the \$3.5 million assessed against ARCO was 0.052% of ARCO's net worth and 0.35% of ARCO's annual income). In *Rosener v. Sears, Roebuck & Co.*, 110 Cal. App. 3d 740, 750, 168 Cal. Rptr. 237 (1980) the final \$2.5 million punitive damages award was something "less than [0.06125%] of Sears' net assets."

<sup>17</sup>ARCO argues the compensatory damages were \$79,061. This amount was only the actual "out-of-pocket" loss as distinguished from future lost profits, allowable under California law as compensatory damages for certain kinds of fraud.

<sup>18</sup>ARCO asserts in several places that Nielsen contended a \$15,000 punitive damage case, *Hartman v. Shell Oil Co.*, 68 Cal. App. 3d 240, 137 Cal. Rptr. 244 (1977), was "closely analogous." Pet. 9 n. 5; 18:14. Nielsen argued that *Hartman* is closely analogous on the compensatory damages issues, but never argued that it is analogous on the punitive damage issues. See App. 28a *et seq.*

supervisory jurisdiction over state courts and, in reviewing a state court judgment, is confined to evaluating it only in relation to the Federal Constitution. *Chandler v. Florida*, 449 U.S. 560, 570 (1981).

**B. The Eighth Amendment Excessive Fines Clause Does Not Invalidate California's Long-Standing Standards**

The Excessive Fines Clause issues — historical and practical — have been fully briefed in *Bankers Life*. Therefore, only a few additional comments will be made here.

Appellant in *Bankers Life*, petitioner in *Downey*, and ARCO here, argue that under an Excessive Fines analog, criminal fines for similar conduct in the range of \$500 to \$2,500 (*see* Pet. 18 n. 8) is the maximum punitive damages amount that can constitutionally be allowed. This argument not only fails to adequately respond to the countless cases over the centuries both in England and the United States which have refused to apply any such limits to punitive damages, but also, as to California, ignores the California legislature's current attention to and decision about the cluster of considerations relevant to determining what is "excessive" punitive damages in a given case.

Effective January 1, 1988, California enacted the Civil Liability Reform Act of 1987. One of its major provisions modified existing statutory law on punitive damages, codified at California Civil Code § 3294. Among the changes are that oppression, fraud or malice which give rise to punitive damage liability must now be "proven by clear and convincing evidence"; previously these had to be established by a preponderance of the evidence. Also, the

statutory definitions of "malice" and "oppression" were amended to add that the conduct must be "despicable."

The California legislature is aware of and regularly reacts to case law in its jurisdiction as well as the impact of its previously enacted statutes. "We must . . . assume that in passing a statute the Legislature acted with full knowledge of the state of the law at the time [citations]." *In re Misener*, 38 Cal. 3d 543, 552, 213 Cal. Rptr. 569 (1985); to similar effect is *Samuels v. Dist. of Columbia*, 770 F.2d 184, 194 and n. 7 (D.C. Cir. 1985) for Congress. The legislature did not, although it certainly could have, set monetary limits or fixed ratios on punitive damages. Thus, at least as to California, the legislature after assessing and reevaluating the myriad of policy considerations chose not to draw the analog to criminal fines or to otherwise set a fixed limit on punitive damages. By implication, the subjective societal value judgment advocated by petitioners in *Bankers Life*, in *Downey*, and in this case has been rejected by the duly elected legislature in California, and should not be second-guessed. The legislature, well aware of all criminal penalties — fines or otherwise — is, at least for the present, satisfied that civil punitive damages are not "excessive" under current jury discretion, judicial scrutiny and controlling case law.

### C. ARCO's Due Process Clause Argument Does Not Justify Granting The Petition

ARCO's due process, really tag-along, argument is that it "should receive . . . all of the rights [it] would have in a criminal trial." Pet. 20:6-10. Before speculating on what ARCO might mean by this blunderbuss, one important point is noted.

ARCO does not and cannot argue that it was subjected to liability without notice or under changing law. Thus,

ARCO's due process argument is fundamentally weaker than either *Bankers Life* or *Downey* where defendants both claim they were subjected to substantive law which had been formulated in the respective states after the complained-of conduct. In contrast, ARCO was found liable for fraud and deceit (failure to disclose) (CT 640-41) under well-defined law. Moreover, California has since 1872 codified that punitive damages in civil cases are allowed for fraud. Likewise, California case law has long held that the amount of punitive damages is to be determined under the three-factor guidelines previously discussed. See generally *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 155 Cal. App. 3d 381, 202 Cal. Rptr. 204 (1984), for a complete historical tracing of California's punitive damages law. Neither at trial, nor to the Court of Appeal nor to the California Supreme Court did ARCO ever argue that the jury was not properly instructed under this long-standing law, nor that the law was unfair in substance or application, nor that the law changed to ARCO's surprise.

Even if ARCO's claim did encompass substantial due process questions, it would be inappropriate to review them as presented here. ARCO's due process claim includes the entire range of criminal procedures and safeguards. As this Court has often explained, "[e]ach constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved." *Johnson v. New Jersey*, 384 U.S. 719, 728 (1966); accord *Brown v. Louisiana*, 447 U.S. 323 (1980). Among these procedural rules and rights are the Double Jeopardy Clause, the right against self-incrimination, unanimous jury verdicts (both for acquittal and criminal liability), liability "beyond a reasonable doubt,"

and the right to competent counsel, as well as appointed counsel if the accused is indigent. ARCO's position would have extraordinary consequences for state tort systems (see *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984) ("Punitive damages have long been a part of traditional state tort law.")) and indeed require wholesale revision of state tort systems.

Given that ARCO has not objected to, identified, discussed or argued any particular due process right afforded criminal defendants, given that neither the trial court, nor the California Court of Appeal nor the California Supreme Court has been presented any such argument or issue as applied to this case, given that ARCO never even mentioned "due process" until now, this Court should not grant review on the due process issues raised.

## CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

February 10, 1988

Respectfully submitted,

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## PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On February 10, 1988, I served the within Brief in Opposition in re: "Atlantic Richfield Company -v- John V. Nielsen" in the United States Supreme Court, October Term 1987, No. 87-1196;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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All Parties required to be Served have been Served.



I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on February 10, 1988, at Los Angeles, California

  
CE CE MEDINA